

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DALE EMPEY, an individual,

Plaintiff,

v.

CALIBER HOLDINGS LLC, a foreign  
limited liability company, dba Caliber  
Collision, and CALIBER HOLDINGS OF  
WASHINGTON, LLC, a foreign limited  
liability company, dba Caliber Holdings  
Corporation dba Caliber Collision,

Defendants.

CASE NO. 3:23-cv-05170-RJB

ORDER ON CALIBER HOLDINGS  
LLC'S MOTION TO STRIKE AND  
SEAL

This matter comes before the Court on Defendant Caliber Holdings LLC's ("Caliber") Federal Rule Civil Procedure ("Rule") 12(f) Motion to Strike and W.D. Washington Local Rule Civil Procedure ("Local Rule") 5(g) Motion to Seal (Dkt. 19), and Plaintiff Dale Empey's motion to file a supplemental response (Dkt. 25). The Court has considered the pleadings filed regarding the motions and remaining record.

In this case, Mr. Empey alleges that Caliber, his employer, failed to compensate him in accordance with Washington law. Dkt. 1-2. In his recently filed Amended Complaint, Mr.

1 Empey further alleges that during settlement talks, Caliber violated Washington’s Silenced No  
2 More Act, RCW 49.44.211 (“SNMA”). Dkt. 17.

3 Caliber now contends that the allegations related to Mr. Empey’s SNMA claims violate  
4 Washington’s Uniform Mediation Act, RCW 7.07.030 (“Mediation Act”). Dkt. 19. Caliber  
5 moves for an order: (1) striking from the Amended Complaint all references to and excerpts  
6 from confidential mediation communications and/or (2) sealing all previously disclosed and  
7 future privileged mediation communications on which Mr. Empey intends to rely. Dkt. 19. For  
8 the reasons provided below, the motion (Dkt. 19) should be denied, in part, and denied, without  
9 prejudice, in part. Mr. Empey’s motion to file a supplemental response (Dkt. 25) should be  
10 denied.

### 11 I. FACTS

12 As this case progressed, the parties attempted to settle the case by mediation. Dkt. 23 at 1.  
13 They agreed on a mediator and on March 1, 2024, the parties executed a Confidentiality  
14 Agreement which was drafted by their chosen mediator. Dkt. 21-2. The Confidentiality  
15 Agreement provided, in part, “[a]ll statements made during the course of mediation are  
16 privileged, are made without prejudice to any party’s legal position, and are non-discoverable  
17 and inadmissible for any purpose in any legal proceeding.” Dkt. 21-2 at 2. It further provided  
18 that “[e]vidence of anything said or of any admission made in the course of mediation is not  
19 admissible in evidence . . .” and that “[u]nless the document otherwise provides, no document  
20 prepared for the purpose of, or in the course of, or pursuant to, the mediation . . . is admissible in  
21 evidence . . .” *Id.*

22 On April 17, 2024, Mr. Empey, his lawyer, and Caliber’s lawyers participated in a virtual  
23 mediation hearing. Dkt. 20 at 1. After the mediation hearing and through July of 2024, the  
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1 parties continued to communicate with each other by phone and email and copied the mediator  
2 on the emails. Dkts. 20 at 1-2; 21 at 2. Other than responding to a second request for mediation,  
3 the mediator did not respond to (except with out-of-office notices), or acknowledge, the emails.  
4 Dkts. 23 at 2-3; 23-2, 23-3 and 23-4. The email communications involved negotiating settlement  
5 agreement terms and discussed items like case deadlines. Dkt. 20 at 2.

6 On July 11, 2024, the parties' lawyers (not the parties) had a "short call" with the  
7 mediator. Dkt. 23 at 4. According to Mr. Empey's lawyer, "[t]here were no negotiations during  
8 this call, and there were no changes in any parties' position. . . the only information conveyed  
9 during the call was that [Caliber] continued to demand the same terms that [Mr. Empey] had  
10 already rejected, and that [Mr. Empey] continued to reject those terms." *Id.*

11 The parties met on July 30, 2024, and Mr. Empey informed Caliber that he intended to  
12 move to amend the complaint to add an SNMA claim. Dkt. 20 at 2. Caliber indicated that it  
13 would not oppose the amendment but indicated that it thought the Amended Complaint should be  
14 sealed because it may contain privileged and confidential mediation information. *Id.* On August  
15 22, 2024, Mr. Empey sent Caliber a copy of a proposed unopposed motion to amend the  
16 complaint and a copy of the proposed amended complaint. *Id.* Caliber did not object to the  
17 amendment at that time.

18 On August 26, 2024, Mr. Empey filed the unopposed motion to amend his complaint  
19 (Dkt. 14) and included a copy of his proposed amended complaint (Dkt. 14-1). His motion was  
20 granted (Dkt. 16) and he filed his Amended Complaint (Dkt. 17). In addition to the wage claims  
21 that were made in the original Complaint, the Amended Complaint adds a claim pursuant to the  
22 SNMA. Dkt. 17 at 16-23. It alleges that Caliber violated the SNMA on several occasions,  
23 primarily related to terms in various versions of Caliber's proposed settlement agreement. *Id.*

1 Allegations in support of the SNMA claim include that Caliber “demand[ed] that Plaintiff and  
2 his counsel agree not to discuss the existence or facts of Plaintiff’s wage and employment claims  
3 in any public forum” and that Caliber “demand[ed] that Plaintiff agree not to disclose the fact or  
4 terms of any settlement of his employment and/or wage claims” against it. *Id.* at 17-18.

5 After the Amended Complaint was filed, Caliber contacted Mr. Empey to see if he would  
6 agree to file the Amended Complaint under seal and file a redacted public version. Dkt. 20 at 2.  
7 The parties were not able to come to an agreement. *Id.*

8 Caliber now moves to strike provisions in the Amended Complaint which identify  
9 specific actions it took that allegedly violate the SNMA. Dkt. 19. If the Court does not strike  
10 those portions of the Amended Complaint, Caliber moves the Court for an order sealing the  
11 Amended Complaint and requiring that future filings containing privileged mediation  
12 communications be filed under seal. *Id.*

13 Mr. Empey responded (Dkt. 22) and Caliber filed a reply to the response (Dkt. 24). Mr.  
14 Empey then moved for leave to file a supplemental response (Dkt. 25) with the proposed  
15 supplemental response attached (Dkt. 25-1), which Caliber opposed (Dkt. 26).

16 The Court should first decide whether Mr. Empey should be permitted to file a supplemental  
17 response (Dkt. 25) and then consider Caliber’s motion to strike and/or motion to seal (Dkt. 19).

## 18 **II. DISCUSSION**

### 19 **A. MR. EMPEY’S MOTION TO FILE SUPPLEMENTAL RESPONSE**

20 Mr. Empey’s motion to file a supplemental response (Dkt. 25) should be denied. Under  
21 Local Rule 7(g), surreply briefs are “strictly limited” to addressing “requests to strike material  
22 contained in or attached to submissions of opposing parties.” “Extraneous argument or a  
23 surreply file for any other reason will not be considered.” Local Rule 7(g)(2). Mr. Empey seeks  
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1 to file a surreply that makes substantive arguments related to Caliber’s reply; it is not a request to  
 2 strike material in, or attached to, that reply. Dkt. 25. It should not be considered.

3 **B. THE SNMA, MEDIATION ACT, AND CALIBER’S MOTION TO STRIKE OR**  
 4 **MOTION TO SEAL**

5 As stated above, in addition to the prior wage claims, the Amended Complaint adds a  
 6 claim pursuant to the SNMA. Dkt. 17 at 16-23. Caliber moves to strike provisions in the  
 7 Amended Complaint which identify specific actions it took that allegedly violate the SNMA.  
 8 Dkt. 19. Caliber contends that these allegations violate the Mediation Act. *Id.* To decide  
 9 Caliber’s motion, a brief explanation of both the SNMA and Mediation Act is helpful.

10 1. SNMA

11 Effective June 9, 2022, the SNMA provides:

12 A provision in an agreement by an employer and an employee not to disclose or  
 13 discuss conduct, or the existence of a settlement involving conduct, that the  
 14 employee reasonably believed under Washington state, federal, or common law to  
 15 be illegal discrimination, . . . **a wage and hour violation**, . . . or that is recognized  
 16 as against a clear mandate of public policy, is void and unenforceable.

17 RCW 49.44.211(1)(*emphasis added*). It further provides that “[p]rohibited nondisclosure and  
 18 nondisparagement provisions include those contained in employment agreements, . . .  
 19 **agreements to pay compensation in exchange for the release of a legal claim**, or any other  
 20 agreement between an employer and an employee.” *Id.* (*emphasis added*) Violations include  
 21 employers “request[ing] or requir[ing] that an employee enter into any agreement provision that  
 22 is prohibited” by the SNMA or “[a]tttempt[ing] to influence a party to comply with a provision in  
 23 any agreement that is prohibited” by the SNMA. RCW 49.44.211(4) and RCW 49.44.211(5).  
 24 Employers who violate the SNMA are liable for actual or statutory damages of \$10,000 and  
 attorneys’ fees and costs. RCW 49.44.211(7). The SNMA further directs that its provisions “are  
 to be liberally construed to fulfill its remedial purpose.” RCW 49.44.211(10).

Perhaps due to the statute’s relatively new passage, there are only two Washington state court cases and one case from the U.S. District Court for the Eastern District of Washington which reference the SNMA. *Flynn v. Master Builder Ass'n of King & Snohomish Ctys.*, 2024 WL 4026250, at \*1 (Wash. Ct. App. Sept. 3, 2024)(noting that the plaintiff made a claim under the SNMA but reversed and remanded case on other grounds); *Allread v. City of Burien*, 29 Wn. App. 2d 1018 (2024)(rejecting plaintiff’s argument that the parties’ separation agreement violated the SNMA because the argument was raised for the first time in the reply). *Kane v. Mednax Servs., Inc.*, 2022 WL 16748784, at \*6 (E.D. Wash. Nov. 7, 2022)(citing the SNMA and noting that recent amendments to Washington’s labor statutes reveals a “clear intent” to avoid confidentiality provisions in employment agreements as they relate to claims arising from discrimination, harassment, retaliation, sexual assault, and wage and hour violations”) *rev’d on other grounds*, 2023 WL 8797505 (9th Cir. Dec. 20, 2023). In any event, none of these cases address the intersection between the SNMA and Mediation Act.

## 2. Mediation Act

Under Washington’s Mediation Act, “a mediation communication is privileged” unless the privilege is waived or precluded. RCW 7.07.030(1). Accordingly, as is relevant here, “in a proceeding,” a mediation party, like Caliber, “may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.” RCW 7.07.030(2)(a). The Mediation Act defines “mediation communication” as a statement “that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” RCW 7.07.010(2). A proceeding is defined as a “judicial . . . or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery . . .” RCW 7.07.010(7). At least one court has broadly construed the

1 mediation communication privilege. *See King Cnty. v. Travelers Indem. Co.*, 2018 WL 1994119,  
2 at \*2 (W.D. Wash. Apr. 27, 2018).

3 3. Caliber's Motion to Strike

4 Under Rule 12(f), the Court may “strike from a pleading an insufficient defense or any  
5 redundant, immaterial, impertinent, or scandalous matter.” The purpose of a Rule 12(f) motion  
6 to strike is “to avoid the expenditure of time and money that must arise from litigating spurious  
7 issues by dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618  
8 F.3d 970, 973 (9th Cir. 2010). Motions to strike material are disfavored and should only be  
9 granted for the five reasons discussed in the rule – material that is “(1) an insufficient defense;  
10 (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous.” *Id.* at 973-974.

11 None of Rule 12(f)'s grounds apply. (1) The allegations in the Amended Complaint  
12 Caliber seeks to strike are not a defense and so are not an “insufficient defense.” (2) The  
13 allegations are not “redundant” – they do not needlessly repeat information. (3) The Amended  
14 Complaint's allegations are arguably not “immaterial;” they appear to have an important  
15 relationship to Mr. Empey's SNMA claim. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527  
16 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994)(noting that matter is immaterial if  
17 it has no essential or important relationship to a claim). (4) The allegations are not “impertinent”  
18 because they may pertain and be necessary to the SNMA claim. *Id.* (noting that “impertinent”  
19 statements do not pertain and are not necessary to the issues). (5) There is no showing that the  
20 allegations are “scandalous.” Caliber's motion to strike should be denied.

21 4. Caliber's Motion to Seal

22 If the motion to strike is denied, Caliber moves the Court for an order sealing the  
23 Amended Complaint, requiring Mr. Empey file a redacted Amended Complaint, and requiring  
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1 that future filings containing privileged mediation communications be filed under seal along with  
2 redacted public versions. Dkt. 19.

3       There is a strong presumption in favor of access to court records. *Ctr. for Auto Safety v.*  
4 *Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016). A party seeking to seal a judicial  
5 record (that is more than tangentially related to the merits of the case) bears the burden of  
6 overcoming this strong presumption by meeting the “compelling reasons standard.” *Id.* Under  
7 this stringent standard, court records may only be sealed when a court finds “a compelling reason  
8 and articulates the factual basis for its ruling, without relying on hypothesis or conjecture.” *Id.* at  
9 1096-97. It must then “conscientiously balance the competing interests of the public and the  
10 party who seeks to keep certain judicial records secret.” *Id.* at 1097. Further, under Local Rule  
11 5(g)(3)(B), for a motion to seal, the court should consider (i) “the legitimate private or public  
12 interest that warrant the relief sought;” (ii) “the injury that will result if the relief sought is not  
13 granted;” and (iii) “why a less restrictive alternative to the relief sought is not sufficient.”

14       Considering the current record, Caliber’s motion to seal the Amended Complaint and  
15 further filings that contain mediation communications (Dkt. 19) should be denied without  
16 prejudice. Caliber has shown that its interest in a potential mediation communication privilege  
17 combined with its reliance on the parties’ representations in the mediation Confidentiality  
18 Agreement constitute “compelling interests.” *Ctr. for Auto Safety* at 1097. The competing  
19 interests of the public are also substantial, however. While the public and Caliber have an  
20 interest in promoting candid participations in mediations (with the assurance that the mediation  
21 communications will remain confidential), the public has a strong interest in access to court  
22 records. *Id.* at 1096. The Washington state legislature has provided an equally important public  
23 interest: that of openness in settlement agreements as they relate to claims arising from  
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1 employment discrimination or wage and hour violations as codified in the SNMA. It appears  
2 that the Washington legislature may have created two competing interests in the Mediation Act  
3 and SNMA. In any event, on balance, considering the current record, the public interests  
4 outweigh Caliber's interest in having the Amended Complaint sealed. It is unnecessary to  
5 consider whether Caliber met Local Rule 5(g)(3)(B)'s requirements because it did not make a  
6 sufficient showing on the "compelling interest" balancing test.

7                   5. Conclusion

8           Mr. Empey's motion to file a supplemental response should be denied. Caliber's motion  
9 to strike should be denied and its motion to seal should be denied without prejudice. Nothing in  
10 this order should be construed as ruling on the validity of Mr. Empey's SNMA claim or on  
11 Caliber's Mediation Act privilege claim.

12           Caliber's motions are side issues and do not resolve any key issues in this case. Key  
13 issues on Mr. Empey's SNMA claim and Caliber's Mediation Act privilege claim, likely best  
14 presented in dispositive motions after discovery is complete, may include whether there are  
15 issues of fact about when the mediation ended and whether there is admissible evidence to  
16 support Mr. Empey's SNMA claim either because of Caliber's Mediation Act privilege claim or  
17 the parties' mediation contract. In any event, the parties here appear to be distracted from the  
18 core issues in the case – that is whether Caliber's compensation scheme violated Mr. Empey's  
19 rights.

20                                   **III. ORDER**

21           Therefore, it is hereby **ORDERED** that:

- 22                   • Mr. Empey's motion to file a supplemental response (Dkt. 25) **IS DENIED**;
- 23                   • Caliber's Rule 12(f) Motion to Strike (Dkt. 19) **IS DENIED**, and
- 24

- Caliber's Local Rule 5(g) Motion to Seal (Dkt. 19) **IS DENIED WITHOUT PREJUDICE.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 15th day of October, 2024.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN  
United States District Judge